No. 91-7611-CFY
Status: DECIDED

Title: James Edward Langston, Petitioner
v.
United States

Docketed:
March 12, 1992

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Craig,Robert L.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Mar 12 1992	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Mar 24 1992		Waiver of right of respondent United States to respond filed.
4	Apr 2 1992		DISTRIBUTED. April 17, 1992
5	Apr 13 1992	P	Response requested -- BRW. (Due May 13, 1992)
7	May 7 1992		Order extending time to file response to petition until June 12, 1992.
8	Jul 13 1992		Brief of respondent United States in opposition filed.
9	Jul 16 1992		REDISTRIBUTED. September 28, 1992
11	Oct 5 1992		REDISTRIBUTED. October 9, 1992
13	Oct 13 1992		Petition DENIED. Dissenting opinion by Justice White with whom Justice Thomas joins. (Detached opinion.)

****

ORIGINAL

NO. 91-7611

Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
SPRING TERM, 1992

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES Movant, JAMES EDWARD LANGSTON, by and through his attorney, Mr. Robert L. Craig, Jr., who files this motion to proceed in forma pauperis, and would show the Court as follows:

1. Counsel has been previously appointed under the Criminal Justice Act to represent Movant in prior proceedings. Counsel was appointed under the Criminal Justice Act of 1964, as amended, by the Fifth Circuit of Appeals. A copy of that appointment previously filed with the Fifth Circuit is attached as Exhibit "A."

2. Movant requests that the Court note the previous appointment and carry it over into this proceeding pursuant to the Supreme Court of the United States Rule 39.

WHEREFORE, PREMISES CONSIDERED, Movant requests the Court to grant his motion to proceed in forma pauperis.

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Robert L. Craig, Jr.
SBN 04987300

ATTORNEY FOR MOVANT

CJA 20 (Int. - 4/88) **APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL**

1. JURISDICTION	2. MAG. DOCKET NO.	3. DIST. CT. DOCKET NO.	VOUCHER NO.
☐ MAG. 2 ☐ DIST. 4 ☒ APPEALS ☐ OTHER		CR5-90-040-1	0286642

APPEALS DOCKET NO.	5. FOR (DISTRICT/CIRCUIT)	6. LOC. CODE	7. CHARGE/OFFENSE (U.S. or other code citation)	7A. CASE CODE
90-1682	FIFTH	LAUNO	21:841(a)(1)18:924	TD

8. IN THE CASE OF	9. PERSON REPRESENTED (FULL NAME)	9A. NO. REPRES.
USA vs LANGSTON,	JAMES EDWARD LANGSTON	1

10. PERSON REPRESENTED (STATUS)
1 ☐ DEFENDANT—ADULT 3 ☒ APPELLANT 5 ☐ OTHER
2 ☐ DEFENDANT—JUVENILE 4 ☐ APPELLEE

11. PROCEEDINGS (Describe briefly)
APPEAL

12. PAYMENT CATEGORY
A ☐ FELONY C ☐ PETTY OFFENSE E ☐ OTHER
B ☐ MISDEMEANOR D ☒ APPEAL

U.S. COURT OF APPEALS
FILED
AUG 24 1990
CLERK

13. COURT ORDER
O ☒ Appointing Counsel F ☐ Subs. for FD P ☐ Subs. for Panel Atty. GILBERT F. GANUCHEAU
Name of prior panel attorney
C ☐ Co-Counsel R ☐ Subs. for Retained Atty. Appt. Date
Voucher No.

Because the above-named "person represented" has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in item 14 is appointed to represent this person in this case.

▶ Mary G. Lopiparo
Sig. of Presiding Judicial Officer or By Order of Court (Clerk/Deputy)

▶ 8-24-90
Date of Order

▶
Nunc Pro Tunc Date

14. NAME OF ATTORNEY/PAYEE AND MAILING ADDRESS
Bob Craig
P O Box 2585
Lubbock, TX 79408

15. TELEPHONE NO.	16. SOC. SEC. NO.
806/765-7491	466-76-6070

CLAIM FOR SERVICES OR EXPENSES

	SERVICE	HOURS	DATES	
17. IN COURT	a. Arraignment and/or Plea			Multiply rate per hour times total hours to obtain "In Court" compensation. Enter total below.
	b. Bail and Detention Hearings			
	c. Motions Hearings			
	d. Trial			
	e. Sentence Hearings			
	f. Revocation Hearings			
	g. Appeals Court			
	h. Other (Specify on additional sheets)			17A. TOTAL IN COURT COMP. $
	(Rate per hour =) TOTAL HOURS =			
18. OUT OF COURT	a. Interviews and conferences			Multiply rate per hour times total hours. Enter total "out of court" compensation below.
	b. Obtaining and reviewing records			
	c. Legal research and brief writing			
	d. Travel time (Specify on additional sheets)			18A. TOTAL OUT OF COURT COMPENSATION $
	e. Investigative and other work (Specify on additional sheets)			
	(Rate per hour =) TOTAL HOURS=			

19. EXPENSES	TRAVEL, LODGING, MEALS ETC.	AMOUNT	OTHER EXPENSES	AMOUNT	
					19A. TOTAL TRAVEL EXP. $
					19B. TOTAL OTHER EXP. $
					20. GRAND TOTAL CLAIMED $

21. CERTIFICATION OF ATTORNEY/PAYEE FOR PERIOD _____ TO _____

F ☐ Final Payment I ☐ Interim Payment No. _____

Has compensation and/or reimbursement for work in this case previously been applied for? ☐ YES ☐ NO

If yes, were you paid? ☐ YES ☐ NO If yes, by whom were you paid? _____ How much? _____ Has the person represented paid any money to you, or to your knowledge to anyone else, in connection with the matter for which you were appointed to provide representation? ☐ YES ☐ NO

If yes, give details on additional sheets.

I swear or affirm the truth or correctness of the above statements

▶ _____ SIGNATURE OF ATTORNEY/PAYEE

▶ _____ DATE

APPROVED FOR PAYMENT	22. IN COURT COMP.	23. OUT OF COURT COMP.	24. TRAVEL EXPENSE	25. OTHER EXPENSES	26. TOTAL AMT. APPROVED/CERT.
	$	$	$	$	$

27. SIGNATURE OF PRESIDING JUDICIAL OFFICER	DATE	27A. JUDGE/MAG. CODE
28. SIGNATURE OF CHIEF JUDGE, CT. OF APPEALS (OR DELEGATE)	DATE	29. TOTAL AMT. APPROVED $

ORIGINAL - MAIL TO ADMINISTRATIVE OFFICE AFTER SERVICE RENDERED

Exhibit "A"

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1992

_____

JAMES EDWARD LANGSTON,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

_____

Robert L. Craig, Jr.
Counsel of Record for Petitioner
Texas Bar No. 04987300

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QUESTIONS PRESENTED

1. Whether mere presence in a room constitutes "use" of a firearm so as to meet due process requirements of proof beyond a reasonable doubt of possessing a firearm during the commission of an entirely unrelated crime.

2. Whether a conspiracy exists between three defendants without some connection or agreement between the parties so as to meet due process requirements of proof beyond a reasonable doubt.

3. Whether a criminal defendant may reserve an evidentiary issue for appeal solely by making a timely objection at trial.

4. Whether the Court of Appeals violated Petitioner's right to Due Process under the Fifth Amendment through its application of FED. R. APP. P. 10(b).

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TABLE OF AUTHORITIES

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1992

JAMES EDWARD LANGSTON,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

The Petitioner, JAMES EDWARD LANGSTON, prays that this Court issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on December 18, 1991.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, appears at Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was rendered on December 18, 1991. Jurisdiction to review said judgment herein by writ of certiorari is conferred on this Court by 28 U.S.C.A. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution Amendment V:

"Nor shall any person...be deprived of life, liberty, or property, without due process of law..."

Federal Rules of Appellate Procedure, Rule 10(B) (2):

"If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion."

STATEMENT OF THE CASE

Petitioner had court-appointed trial counsel. Petitioner, through his trial counsel and counsel on appeal, argued that the Petitioner did not have "use" of a weapon. The Petitioner was convicted of intending to use a gun during the commission of a drug offense. The mere presence of a firearm does not constitute "use" as contemplated by Title 18, United States Code, § 924(c) (1). The due process requirements were not met because there was no relation

or connection between the firearm and the underlying crime.

Trial court counsel and counsel on appeal further argued and objected that any conspiracy between Petitioner, Rodney Featherson and Ray Langston does not meet the due process requirements of proof beyond a reasonable doubt. The government asserted a conspiracy among three defendants, pursuant to Title 21, United States Code, § 846. No agreement or connection existed between the Petitioner and Rodney Featherson.

Transcripts of audio tapes relating to conversations between the confidential informants and Petitioner were offered by the government as an aid to the jury. The tapes were of poor quality. The transcripts published to the jury as a trial aid differed from those previously furnished Petitioner in at least a dozen instances, including the alleged identity of the speaker on some occasions. Petitioner objected to the use of such transcripts as a jury aid. The government admitted that the transcripts were not furnished to Petitioner's counsel prior to trial and that the transcripts were developed on Saturday and Sunday prior to trial using equipment not made available to Petitioner's counsel. Despite these admissions and no showing of any reason for such government tactics, the District Court overruled Petitioner's objections.

Before the Fifth Circuit, Petitioner was represented by different counsel. Petitioner argued that the trial court erred by allowing the government to exert an immense tactical advantage over Petitioner, an indigent defendant. However, the Court ruled that

Petitioner waived his right to complain about the transcripts because he did not move for a recess or continuance after the transcripts were admitted in the District Court. Moreover, even though the transcripts were never admitted into evidence, the Court said that Petitioner failed to preserve error by not transmitting the transcripts to the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

1. *The Court of Appeals has rendered a decision herein in conflict with the decision of the United States Court of Appeals, Second Circuit, in United States v. Feliz-Cordero, and in the United States Court of Appeals, Third Circuit, in United States v. Theodoropoulos, and the decision does not meet due process requirements of proof beyond a reasonable doubt.*

ARGUMENT AND AUTHORITIES

A person cannot be said to "carry" a firearm without at least showing that the gun is within reach during the commission of the drug offense. U. S. v. Feliz-Cordero, 859 F.2d 250 (2nd Cir. 1988). Because the firearm was not within the reach of the Appellant, JAMES EDWARD LANGSTON, a conviction in this situation cannot stand unless it is predicated on the provision of 18 United States Code § 924c(1) relating to "uses a firearm."

Feliz-Cordero, at 254, states in relevant part as follows:

> In 1984, Congress revised § 924(c). Prior to 1984, the statute provided that it was a crime to carry a firearm 'during the commission of any felony . . . .'. 18 U.S.C. § 924 (c)(2)(1982). The 1984 amendment established as the predicate offense 'any crime of violence' instead of 'any felony' and substituted the phrase 'during and in relation to' for the word 'during.' In 1986, the statute was again amended to add 'drug trafficking crime' as a 'predicate offense.'
>
> The legislative history of the 1984 amendment indicates

that the 'in relation to' language was intended to make explicit that a person could not be prosecuted under § 924(c) for possessing a firearm during the commission of an entirely unrelated crime. (Citations omitted.) Thus, § 924(c) requires more than mere possession of a firearm. Rather, there must be some relation or connection between the firearm and the underlying crime. The necessary relation or connection between possession of a firearm and the underlying crime is established 'if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape.'

Based on the foregoing analysis, in order for possession of a firearm to come within the 'uses' provision of § 924(c), one of the following is required:

i. Proof of a transaction in which the circumstances surrounding the presence of a firearm suggests that the possessor of the firearm intended to have it available for possible use during the transaction; or

ii. The circumstances surrounding the presence of a firearm in a place where drug transactions take place suggests that it was strategically located so as to be quickly and easily available for use during such a transaction.

The presence of a firearm in a dresser drawer does not meet either of the requirements set out above. On the evidence presented, there is no basis to conclude that the gun would have been quickly accessible if needed. Rather, under the circustances of this case, the intent to use the firearm must be presumed from the fact that a loaded gun was found in the same room as drug paraphernalia during the course of a search pursuant to a warrant. This is not sufficient evidence to sustain a conviction, even in light of our recognition of the frequent connection between firearms and narcotics trafficking.

In U.S. v. Theodoropoulos, 866 F.2d 587 (3rd Cir. 1989), the Court also examined and wrote about the 1984 amendment to § 924(c). The Court noted that in light of the 1984 amendment, that the

Feliz-Cordero court held that a loaded gun concealed in a drawer, which was discovered during the search of defendant's apartment, was not used during or in relation to a drug trafficking offense.

In Theodoropoulos, at page 597-598, the Court stated that they could not agree with the government that the mere availability of a firearm nearby, as distinguished from its open display, is equal to use "in relation" to an offense. We note that in drafting this provision, Congress required either use or carrying of a firearm. Had it intended the provision to encompass possession of a firearm during a drug trafficking offense, it would have so provided.

In the case at bar, Petitioner was in Apartment No. 3, which was not registered or rented to JAMES EDWARD LANGSTON, nor did JAMES EDWARD LANGSTON have a key to the apartment. Upon search of the apartment, the firearm was found between the mattress and box springs in the living room/bedroom combination. (R2: 259). The Petitioner was standing 6 to 8 feet from where the firearm was located. (R2: 259). The firearm was not quickly accessible if needed. The government's own witness, Officer James H. Taylor, a sergeant with the City of Lubbock Police Department assigned to the Narcotics Division, who participated in the search of Apartment No. 3 at 1702 Avenue B in Lubbock, Texas, testified that no one had dominion and control over the weapon at that particular time. (R2: 284).

A motion for judgment of acquittal was made by the Petitioner. (R4:656).

This is not a case where officers have found multiple weapons

in strategic locations. This is simply a case where the presence of a single firearm has been found during the search of the apartment and a conviction should not stand. The standard used by the Fifth Circuit is clearly in conflict with Feliz-Cordero and Theodoropoulos. Further, it violates the constitutional necessity of proof of guilt beyond a reasonable doubt, as guaranteed by due process. Jackson v. Commonwealth of Virginia, 443 U.S. 307, 61 L.Ed. 560, 99 S.Ct. 2781 (1979).

The United States Supreme Court has an opportunity in this case to decide what constitutes "use" as required by § 924(c).

2. *The Court of Appeals has rendered a decision herein in conflict with the decision of the United States Court of Appeals, Second Circuit, in United States v. Tyler, and the decision does not meet due process requirements of proof beyond a reasonable doubt.*

ARGUMENT AND AUTHORITIES

In United States v. Tyler, 758 F.2d 66 (2nd Cir. 1985), helping a willing buyer locate a willing seller, standing alone, is insufficient to establish the existence of an agreement between the facilitator and the seller [citing U.S. v. Hysohion, 448 F.2d 343, 347 (2nd Cir. 1971) ("the fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily imply that there was an agreement between that seller . . . and Rimbaud."); and citing U.S. v. Torres, 519 F.2d 723, 726 (2nd Cir.), cert. denied, 423 U.S. 1019 (1975) ("membership in a conspiracy is not established . . . by the fact that a defendant told a willing buyer how to make contact with a willing seller.")]

In the case at bar, the Petitioner was indicted on a conspiracy with his brother, Ray Langston, and Rodney Featherson, in violation of Title 21, United States Code, § 846. To establish defendant's guilt on the conspiracy count to possess with intent to distribute, the government must prove beyond a reasonable doubt:

1. The existence of an agreement between two or more persons to violate the narcotics law;
2. The defendant knew of the conspiracy; and
3. The defendant voluntarily participated in the conspiracy.

There is no showing of a connection or agreement between JAMES EDWARD LANGSTON (Petitioner) and Rodney Featherson. The government has alleged a conspiracy among all three defendants. The government's own agent, Felix Garcia, on cross-examination, was questioned about the existence of a partnership. Garcia admitted during cross-examination that statements made by the Petitioner, the other defendants, and the confidential informant do not refer to any type of partnership. (R3: 460-464). The Fifth Circuit in deciding the case at bar is in conflict with Tyler, and violates the due process rights guaranteed to the Petitioner. The United States Supreme Court has an opportunity in this case to decide what is required to show a connection sufficient to establish a conspiracy.

3. *The Court of Appeals has rendered a decision herein in conflict with the decision of the United States Court of Appeals, First Circuit, in United States v. Osorio.*

ARGUMENT AND AUTHORITIES

In United States v. Osorio, 929 F.2d 753, 758 (1st Cir. 1991), the defendant was convicted of conspiring to distribute cocaine and of cocaine possession. The prosecution delayed disclosure of evidence that one of its witnesses had a more extensive background in possession than he had previously admitted. Unlike Petitioner in the case at bar, the defendant made no objection to the government's use of the evidence. In holding against the defendant, the Court emphasized the fact that defense counsel made no motion for continuance, motion for dismissal, or objection. Id. In other words, the defendant would have maintained his right to complain about the government's unfair tactics, if he had simply objected at trial.

In the case at bar, Petitioner did object to the government's use of the transcripts. Accordingly, under Osorio, Petitioner preserved his right to complain about the government's use of the transcripts as a jury aid. However, the Fifth Circuit still found against Petitioner. The Court held that in order to salvage his right to complain about the transcripts, Petitioner had to move for a recess or a continuance after the transcripts were published to the jury.

The Fifth Circuit is clearly using a different standard than the First Circuit. Furthermore, as it cited Osorio in ruling that the Petitioner's objection was not sufficient to save his right to complain about the transcripts, the Fifth Circuit obviously has a muddled understanding of the standard now being used by the First Circuit. The Fifth Circuit misapplied the case in their opinion.

The United States Supreme Court has an opportunity in this case to decide what a person must do at trial to preserve error for appeal.

4. *The Fifth Circuit has denied Petitioner Due Process under the Fifth Amendment through its arbitrary application of FED. R. APP. P. 10(b).*

ARGUMENT AND AUTHORITIES

The government transcripts at issue were not part of the record on appeal. FED. R. APP. R. 10(b) requires the appellant to supplement the record with any information relevant to the appeal that is not part of the trial record. See, Adams v. Johns-Manville Sales Corp., 783 F.2d 589, 592 (5th Cir. 1986). Accordingly, Petitioner does not dispute that many of the cases interpreting Rule 10 hold him responsible for including the transcripts in the appellate record. Petitioner believes that these cases should be held as bad law regarding the peculiar circumstances of this case.

The only party to ever have control of the transcripts was the government. Moreover, since the transcripts were not admitted into evidence, they were not part of the trial record. Petitioner, represented by different counsel on appeal, never even had a copy of the transcripts. Still, the Fifth Circuit refused to hear Petitioner's issue because he was unable to produce what he did not have. Simply put, Petitioner did not have the instrumentality to comply with Rule 10.

The Court in U.S. v. Onori, 535 F.2d 938, 948 (5th Cir. 1978), held that it is unnecessary for the trial court to decide whether a transcript is accurate before it is given to the jury, so long as

each party is given an opportunity to submit a transcript that contains its version of the conversation. In other words, as long as each side has a fair and equal opportunity to provide the jury with a transcript that he thinks represents the sounds on the tapes, then the jury may read the transcripts along with the tapes. In the case at bar, the government was given an unfair advantage regarding both the last minute timing of the transcription and its access to superior equipment.

For the Fifth Circuit to deny Petitioner an opportunity to discuss the impropriety of the trial court's decision solely because of Petitioner's inability to fulfill an impossible task is an outrage worthy of this Court's review. Thus, through its application of Rule 10 to Petitioner's case, the Court of Appeals violated Petitioner's right to due process under the Fifth Amendment.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit.

Robert L. Craig, Jr.
Counsel of Record for Petitioner
Texas Bar No. 04987300

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CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Petition for Writ of Certiorari have been duly mailed to counsel for the United States of America, Honorable Joe C. Lockhart, Assistant U.S. Attorney, 1205 Texas Avenue, Lubbock, Texas, and Solicitor General of the United States, Department of Justice, Washington, D.C. 20503, this 11 day of March A.D., 1992.

Attorney for Petitioner

UNITED STATES of America, Plaintiff-Appellee,

v.

Rodney FEATHERSON, a/k/a River Rat, James Edward Langston, and Ray Langston, a/k/a Big Ray, Defendants-Appellants.

No. 90-1681.

United States Court of Appeals, Fifth Circuit.

Dec. 18, 1991.

Defendants were convicted of conspiracy to distribute cocaine and of use of firearm in connection with drug trafficking crime by the United States District Court for the Northern District of Texas, Samuel Ray Cummings, J., and they appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that: (1) denial of defendant's motion to sever was not abuse of discretion; (2) finding as to existence of conspiracy was sufficiently supported by evidence of defendants' use of same flats to make multiple cocaine sales and of referrals between them; and (3) finding that defendant had used weapon in connection with drug trafficking crime was sufficiently supported by evidence.

Affirmed.

1. Criminal Law ⇐622

As general rule, defendants who are indicted together are tried together.

2. Criminal Law ⇐622

Rule in favor of joint trials for jointly indicted defendants is especially strong when defendants are charged with committing same conspiracy.

3. Criminal Law ⇐1148

Court of Appeals reviews district court's denial of motion for severance for abuse of discretion.

4. Criminal Law ⇐1148

To demonstrate abuse of discretion in denial of motion for severance, defendants must show that joint trial prejudiced them to such an extent that district court could not provide adequate protection, and that prejudice outweighed Government's interest in economy of judicial administration.

5. Criminal Law ⇐1166(6)

Denial of motion for severance will result in reversal only where defendants can show that they were unable to obtain fair trial without severance.

6. Criminal Law ⇐1166(6)

Showing of compelling prejudice is required before Court of Appeals may overrule district court's decision regarding severance.

7. Criminal Law ⇐622.1(2)

Denial of drug conspiracy defendants' motion for separate trials was not abuse of discretion, where Government made complete and coherent case against each defendant, and there was no indication that jury did not consider each defendant individually or each offense separately.

8. Criminal Law ⇐1044.1(5)

Defendants waived right to complain about Government's introduction of transcripts of tape-recorded conversations before they had opportunity to review transcripts, by failing to move for recess or continuance after transcripts were admitted in district court.

9. Criminal Law ⇐1159.6

In reviewing challenge to sufficiency of evidence, appellate court need not find that evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt, provided that reasonable trier of fact could find that evidence establishes guilt beyond reasonable doubt.

10. Criminal Law ⇐1144.13(3, 5)

On sufficiency of evidence challenge, Court of Appeals reviews evidence in light most favorable to Government, making all reasonable inferences and credibility choices in favor of verdict.

11. Conspiracy ⇐24.5, 28(3)

For defendants to be convicted of conspiracy to distribute narcotics, Government must prove beyond reasonable doubt that conspiracy existed, that defendants knew of conspiracy, and that with this knowledge they voluntarily became part of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

12. Conspiracy ⇐44½

Conspiracy may be inferred from concert of action.

13. Conspiracy ⇐40.1

Conspirator cannot escape criminal liability on basis that he played only a minor role in total scheme.

14. Conspiracy ⇐47(12)

Finding that defendants were engaged in conspiracy to distribute cocaine was sufficiently supported by evidence, including evidence that two conspirators repeatedly went to same flats where they made multiple cocaine sales, and that third conspirator had drug-related conversations with second, had drug-related contacts with second, accepted referrals from second conspirator and had apartment in flats near those frequented by other conspirators. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

15. Weapons ⇐4

Government need not prove actual use or brandishing of weapon, in order to obtain conviction for use of firearm in connection with drug trafficking crime. 18 U.S.C.A. § 924(c)(1).

16. Weapons ⇐17(4)

Government may meet its burden of showing that firearm was used in connection with drug trafficking crime, within meaning of federal criminal statute, by showing that weapon involved could have been used to protect or had potential of facilitation of operation, and that presence of weapon was connected with drug trafficking. 18 U.S.C.A. § 924(c)(1).

17. Weapons ⇐17(4)

Defendant's conviction for use of firearm in connection with drug trafficking crime was sufficiently supported by evidence that defendant was apprehended in apartment near table which was covered with large quantities of cocaine hydrochloride, cocaine base, baking soda and razor blades, and that approximately six to eight feet from where defendant was standing, officers found loaded semiautomatic pistol under mattress, as well as by defendant's statement to woman who was with him in

apartment "Don't say it's mine." 18 U.S.C.A. § 924(c)(1).

18. Weapons ⇐17(4)

Defendant's conviction for use of firearm in connection with drug trafficking crime was sufficiently supported by evidence, including evidence that police found several bundles of cocaine in car which defendant was driving, in addition to unloaded semiautomatic pistol under driver's seat of car where defendant had been sitting and additional guns and ammunition in trunk of car. 18 U.S.C.A. § 924(c)(1).

19. Criminal Law ⇐822(1)

Standard of review for jury instructions is usually whether court's charge, as whole, is correct statement of law and plainly instructs jurors as to principles of law applicable to fact issues confronting them.

20. Criminal Law ⇐1038.1(2)

Standard of review for jury instructions is one of plain error, where defendant did not object to instructions at trial.

21. Criminal Law ⇐1030(1)

"Plain error" is error which is so fundamental as to result in miscarriage of justice.

See publication Words and Phrases for other judicial constructions and definitions.

22. Weapons ⇐17(6)

Trial court's instruction to jury, that it was entitled to consider firearms found in trunk of car that defendant was driving in deciding whether defendant had used firearm in connection with drug trafficking crime, was not plainly erroneous.

23. Criminal Law ⇐1122(5)

Defendant waived argument concerning jury instruction, where contested jury instruction was not in appellate record.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, JOHNSON, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Defendants Rodney Featherson ("Featherson"), James Edward Langston ("James"), and Ray Langston ("Ray") appeal their convictions for various controlled substance violations. They allege: (1) the district court abused its discretion in denying the motions of severance of James and Ray; (2) the district court exceeded its discretion by allowing the jury to use transcripts of audio recordings; (3) there was insufficient evidence to support their convictions of conspiracy with intent to distribute; (4) there was insufficient evidence to support the convictions of James and Featherson for use of a firearm during a drug trafficking crime; and (5) the district court gave an incorrect jury instruction. Finding no error, we affirm.

I.

BACKGROUND

On April 25, 1990, James, Ray and Featherson were charged in a twenty-one count indictment involving various controlled substance violations, including conspiracy to possess with intent to distribute fifty grams or more of cocaine base.

During the period from September 19, 1989 to March 29, 1990, Bureau of Alcohol, Tobacco and Firearms ("ATF") agent Felix Garcia ("Agent Garcia") used confidential informants, Eddie Ward ("Ward") and Shawn Harris ("Harris"), to make numerous purchases of cocaine base or crack cocaine, primarily in the 1700 block of Avenue B ("the flats") in Lubbock, Texas. To prepare for these controlled buys, Agent Garcia would search the informants, place a listening device on them, and then give the informants instructions and funds to purchase crack cocaine. The informants would then make such purchases, and the broadcast of these transactions was then monitored and recorded by surveillance agents. After the transactions, the informants would give the crack cocaine and any remaining buy-money to Agent Garcia. The confidential informants purchased cocaine base or crack cocaine from James, Ray, and Featherson.

These drug transactions played out as follows: on September 19, 1989, Ward went to the flats and James sold him cocaine base; on October 2, 1989, James sold Ward more cocaine base; on October 16, 1989, Ray sold Ward cocaine base at the flats; and, on October 20, 1989, and October 24, 1989, Ray again sold Ward cocaine base at the flats.

Then, on November 19, 1989, the Lubbock police found Featherson with cocaine base in his car. Featherson also had a .25 semi-automatic pistol, a .357 caliber Smith & Wesson, and a .22 caliber revolver in his possession. On January 15, 1990, the Lubbock police found James in an apartment in the flats where James and Ray were attempting to manufacture cocaine base. In addition to the drugs found in the apartment, James had a loaded .380 semi-automatic pistol which the police officers found between a mattress and box springs approximately six to eight feet from where James had been standing.

The controlled buys continued: on March 12, 1990, and again on March 15, 1990, Ray referred Ward to Featherson who sold Ward cocaine base; on March 27, 1990, James and Ray sold cocaine base to Harris; and on March 29, 1990, Ray again sold Harris cocaine base. On March 30, 1990, several federal search warrants were executed on several rooms in the flats; one of these rooms was in Ray's temporary possession. All three defendants were subsequently indicted.

Following a jury trial, James was convicted of eleven counts of drug-related violations; Ray was convicted of twelve counts of drug-related violations; and Featherson was convicted of eight counts of drug-related violations. James was given two sentences—one of 136 months' imprisonment and one of 60 months' imprisonment;[1] Ray was sentenced to 188 months' imprisonment; and Featherson was given two sentences—one of 135 months' imprisonment and one of 60 months' imprisonment. Each defendant also received a five year term of supervised release. All three defendants timely appealed.

II.

THE MOTIONS TO SEVER

[1, 2] James and Ray argue that the district court erred by denying their sepa-

1. James' sentence of 136 months' imprisonment, Ray's sentence of 188 months' imprisonment, and Featherson's sentence of 135 months' imprisonment were for the drug counts. James and Featherson were additionally sentenced to 60 months' imprisonment for their convictions relating to possession of a firearm during a drug trafficking offense. *See infra* note 5.

rate motions for severance. As a general rule, defendants who are indicted together are tried together. *See United States v. Arzola-Amaya*, 867 F.2d 1504, 1516 (5th Cir.), *cert. denied*, 493 U.S. 933, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989) (citation omitted). This rule is especially strong when the defendants are charged with committing the same conspiracy. *See United States v. McGuire*, 608 F.2d 1028, 1031 (5th Cir.1979), *cert. denied*, 446 U.S. 910, 100 S.Ct. 1838, 64 L.Ed.2d 262 (1980) (citation omitted).

[3–6] This court reviews a district court's denial of a motion for severance for abuse of discretion. *See United States v. De Varona*, 872 F.2d 114, 120–21 (5th Cir. 1989) (citation omitted). To demonstrate abuse, defendants must show that the joint trial prejudiced them to such an extent that the district court could not provide adequate protection, and the prejudice outweighed the government's interest in the economy of judicial administration. *Id.* The denial of a motion for severance will result in reversal only where defendants can show that they were unable to obtain a fair trial without a severance. *See United States v. Crawford*, 581 F.2d 489, 491 (5th Cir.1978) (citations omitted). Furthermore, reversal is only warranted when the appellant demonstrates that the trial court was unable to afford protection against compelling prejudice. *Id.* Thus, a showing of compelling prejudice is required before we may overrule the district court's decision regarding severance. *See United States v. Bright*, 630 F.2d 804, 813 (5th Cir.1980) (citation omitted).

[7] James and Ray contend that the evidence showed separate transactions that are similar only in that they occurred in the same location with the same informants during the same time period. The evidence, however, reveals cooperative conduct among the three defendants. Ray and Featherson distributed cocaine base. Ray and James participated in jointly manufacturing and distributing cocaine base, and Ray made referrals to Featherson. The Government made a complete and coherent case against each defendant. The jury considered the counts against each defendant individually, and returned the guilty verdicts against defendants separately; there is no indication that the jury did not consider each defendant individually or each offense separately. *See Arzola-Amaya*, 867 F.2d at 1516 (jury able to compartmentalize evidence where trial court explicitly instructed jury to consider each offense separately and each defendant individually). Thus, the defendants' desire to be tried separately was not shown to have outweighed considerations of judicial economy, and the defendants have failed to show prejudice. Accordingly, we find that the district court did not abuse its discretion in denying defendants' motions for severance.

III.

THE TRANSCRIPTS OF AUDIO RECORDINGS

[8] Audio recordings that were made of the undercover drug transactions were played to the jury, and the district court allowed the jury to use the Government's transcripts of these recordings. James, Ray, and Featherson argue that the district court exceeded its discretion by allowing the jury to use these transcripts of audio proceedings. Specifically, the defendants contend that they did not have the opportunity to review the Government's transcripts, that the transcripts contain many

errors, and that the transcripts are generally unreliable. Defendants cite *United States v. Onori*, 535 F.2d 938 (5th Cir.1976) (discussing procedures to be followed where disputed transcripts of tape recordings are involved) as support for their argument.

If the defendants had intended to urge this issue on appeal, then the necessary materials should have been provided to this court. *See* Fed.R.App.P. 10(b)(2) (explaining appellant's burden to assemble the record on appeal); *see also Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 592 (5th Cir.1986) (burden of presenting an adequate record on appeal is on the appellant). These tapes and transcripts, however, were not provided with the record so we are unable to review the merits of the defendants' contentions. In any event, the defendants waived their right to complain about the transcripts because they did not move for a recess or a continuance after the transcripts were admitted in the district court. *Cf. United States v. Osorio*, 929 F.2d 753, 758 (1st Cir.1991) (defendant waives claim of prejudice—due to delayed disclosure of impeachment evidence—when he fails to object, file a motion for dismissal, or a motion for continuance).

IV.

SUFFICIENCY OF EVIDENCE ISSUES

[9, 10] In reviewing a challenge to the sufficiency of the evidence in a criminal case, it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. *See United States v. Hall*, 845 F.2d 1281, 1283 (5th Cir.), *cert. denied*, 488 U.S. 860, 109 S.Ct. 155, 102 L.Ed.2d 126 (1988) (citation omitted). We review the evidence in the light most favorable to the Government, making all reasonable inferences and credibility choices in favor of the verdict. *See United States v. Evans*, 941 F.2d 267, 271–72 (5th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 451, — L.Ed.2d — (1991) (citation omitted).

A. *The 21 U.S.C. § 846 Conspiracy*

[11–13] James, Ray, and Featherson separately contest their convictions for conspiracy to distribute cocaine.[2] For the defendants to be convicted of a conspiracy under 21 U.S.C. § 846, the Government must prove beyond a reasonable doubt that: (1) a conspiracy existed, (2) the defendants knew of it, and that with this knowledge, (3) the defendants voluntarily became a part of the conspiracy. *See United States v. Bland*, 653 F.2d 989, 996 (5th Cir.), *cert. denied*, 454 U.S. 1055, 102 S.Ct. 602, 70 L.Ed.2d 592 (1981) (citations omitted). The conspiracy may be inferred from concert of action. *See United States v. Simmons*, 918 F.2d 476, 484 (5th Cir.1990) (citation omitted). One cannot escape criminal liability on the basis that one played a minor role in the total scheme. *See United States v. Davis*, 666 F.2d 195, 201 (5th Cir.1982) (citations omitted). We conclude that the Government has met its burden.

[14] Ray contends that the evidence merely shows he sold a small amount of

2. Count One of the indictment alleged violations of 21 U.S.C. § 841(a)(1) (possession with intent to distribute and distribution of cocaine base), 21 U.S.C. § 841(b)(1)(A)(iii) (penalty for possession with intent to distribute and distribution of 50 grams or more of cocaine base), 18 U.S.C. § 2 (principals), and 21 U.S.C. § 846 (conspiracy).

cocaine base over a period of time, but that there was no joint cooperation between himself and the other defendants. James argues that the evidence merely shows unrelated transactions—referrals from one defendant to another with no enmeshing pattern. Featherson argues that he had no association with the other defendants and that he was not involved with their drug transactions.

The defendants' arguments are unpersuasive. The evidence at trial showed that James and Ray repeatedly went to the flats where they made multiple crack sales. In September 1989 and October 1989, James sold cocaine base to Ward. In October 1989 James also referred Ward to Ray who sold him cocaine base, and in October 1989 Ray sold more cocaine base to Ward. In January 1990, James was apprehended at an apartment where he was manufacturing cocaine base, and that apartment was in Ray's temporary custody.[3] Later that year, James and Ray continued to commit drug offenses, selling crack cocaine and cocaine base to confidential informants; in November 1989, Featherson was found in the possession of crack cocaine in the flats; on March 12, 1990, Ray referred Ward to Featherson, and Featherson gave drugs in a bottle to Ray who sold the drugs to Ward; later, on March 15, Ray referred Ward to Featherson who sold drugs to Ward (Featherson stated that it was Ray's dope).

In this case the evidence as a whole is sufficient to establish beyond a reasonable doubt that a conspiracy existed, and that each defendant knew of its existence and voluntarily participated in this conspiracy.[4] The evidence shows that the defendants completed multiple drug transactions in the flats, that the defendants communicated with one another and knowingly agreed to engage in the distribution of cocaine base. The evidence at trial clearly established the conspiratorial relationship between James and Ray.

Although the evidence is less overwhelming with respect to Featherson, it is never-

3. *See infra* note 6.

4. In *United States v. Juarez-Fierro*, 935 F.2d 672, 676–77 (5th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 402, — L.Ed.2d — (1991), we found sufficient evidence to support a conspiracy conviction where defendant Juarez made arrangements for the transportation of marijuana, directed Government-informant Lopez as to when it should be picked up, arranged for storage of the marijuana, and purchased a vehicle to transport Lopez to another city to complete the deal. We rejected Juarez's contention that he was merely in the company of bad men. *Id.* at 677.

Similarly, in *United States v. Evans*, 941 F.2d 267, 271–72 (5th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 451, — L.Ed.2d — (1991), we again found sufficient evidence to establish a conspiracy where Lewis was present at several meetings at which Evans and DEA agents discussed the manufacture of drugs, and Lewis knew of the criminal activity at the laboratory site. There was also testimony that Lewis and Evans had agreed to split the drugs that were manufactured. We rejected the contention that Evans and Lewis did not knowingly and voluntarily participate in the conspiracy. *Id.*

Finally, in *United States v. Simmons*, 918 F.2d 476, 483–84 (5th Cir.1990), we found sufficient evidence to establish the existence of a conspiracy to distribute cocaine where the defendants knew each other, exited a plane together, and were found to be carrying nearly identical packages of cocaine. Although the Government produced no direct evidence that Roser and Simmons mutually agreed to violate federal narcotics laws, the fact that the packages of cocaine both men were carrying were identical supported an inference that the drugs were purchased from the same source. *Id.* at 484. We noted that when added to the other circumstances of the case, this circumstance was enough to infer the requisite concert of action. *Id.*

theless persuasive. Featherson had drug-related conversations with Ray, had drug-related contacts with Ray, accepted referrals from Ray and had an apartment in the flats near those frequented by Ray and James. In *United States v. Vergara*, 687 F.2d 57, 60–61 (5th Cir.1982), we noted that while each piece of evidence, standing alone, might have been susceptible to innocent interpretation, when examined in the aggregate, the evidence established Vergara's part in the conspiracy. We also noted that Vergara's conviction would not be reversed because of a minor role in the overall scheme. *Id.* We found that a jury reasonably could have concluded that the evidence establishing that Vergara was also a source of heroin, that coconspirators visited his home, and that Vergara told a coconspirator to take a brown paper bag out of his car which contained heroin, sufficed to establish that Vergara was a culpable member of the conspiracy. *Id.* Looking at the evidence in the light most favorable to the Government, a rational jury could conclude beyond a reasonable doubt that James, Ray, and Featherson agreed to violate narcotics laws.

B. *The 18 U.S.C. § 924(c)(1) Convictions*

1. James

James maintains that the district court erred in denying his motion for acquittal on Count Fourteen of the indictment, charging him with a violation of 18 U.S.C. § 924(c)(1).[5] He argues that the Government did no more than prove the proximity between the cocaine base, himself and the named weapon. He also argues that he did not use the firearm.

[15, 16] The Government, however, need not prove an actual use or brandishing of the weapon. *See United States v. Coburn*, 876 F.2d 372, 375 (5th Cir.1989). The Government may meet its burden by showing that the weapon involved could have been used to protect or have the potential of facilitating the operation, and that the presence of the weapon was connected with the drug trafficking. *See United States v. Blake*, 941 F.2d 334, 342–43 (5th Cir.1991) (citation omitted). In *United States v. Beverly*, 921 F.2d 559, 561–63 (5th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 2869, 115 L.Ed.2d 1035 (1991), we found that two revolvers and ammunition, located in a safety deposit box under a mattress in a bedroom where cocaine was found and in the apartment that served as the distribution center, were used during and in relation to drug trafficking crimes.

[17] In this case, there is sufficient evidence for a jury to find that James was in the apartment, knew that the gun was under the mattress, and that he could have used the gun to safeguard the narcotics. James was found standing at a table in an apartment in the flats[6]—a table that was covered with large quantities of cocaine hydrochloride, cocaine base, baking soda and razor blades. Approximately six to

5. Section 924(c)(1) provides in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years....

6. The apartment was in the custody of James' brother, Ray. Ray had been given a key to the apartment by the apartment's resident, Charles Mackey.

eight feet from where James was standing, the officers found a loaded .380 caliber semiautomatic pistol under a mattress. During this time, James said to a woman who was with him in the apartment, "Don't say it's mine; don't say it's yours; don't say nothing."

This court has found a conviction under 18 U.S.C. § 924(c)(1) sufficient where the police found loaded weapons and cocaine in a defendant's house. *See United States v. Robinson*, 857 F.2d 1006, 1010 (5th Cir. 1988) (citation omitted). In the case now before us, we find that a reasonable trier of fact could find a connection between the drug conspiracy and the firearm. The evidence was sufficient to support James' conviction on Count Fourteen for use of a firearm in connection with a drug trafficking crime.

2. Featherson

[18] Featherson also argues that his conviction under 18 U.S.C. § 924(c)(1) was not supported by sufficient evidence and that his motion for acquittal should have been granted. We disagree.

On November 19, 1989, after Featherson was stopped by Lubbock police and found with several bundles of cocaine base, Featherson consented to a search of his car. The police found an unloaded .25 semiautomatic pistol under the driver's seat of the car where Featherson had been sitting;[7] a loaded .357 caliber gun and an unloaded .22 revolver in the trunk of his car; and a box of .22 ammunition in the trunk of Featherson's car.

As this court stated in *United States v. Molinar-Apodaca*, 889 F.2d 1417, 1424 (5th Cir.1989) (citations omitted), the Government is only obligated to show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking. Because the Government may meet its burden by showing that the weapons could have been used to protect the operation and that the presence of the weapons was connected with the drug trafficking, *see United States v. Blake*, 941 F.2d 334, 342–43 (5th Cir.1991) (citation omitted), we conclude that the weapons, the presence of ammunition, and Featherson's accessibility to the weapons could lead a rational trier of fact to find that the weapons could be used during and in relation to a drug trafficking offense.

3. The Jury Instruction Regarding 18 U.S.C. § 924(c)(1)

[19–21] Featherson contends that the district court erred in its jury instruction regarding the firearms offense under 18 U.S.C. § 924(c)(1).[8] The standard of review for jury instructions is usually whether the court's charge, as a whole, is a correct statement of the law and plainly instructs the jurors as to the principles of law applicable to the fact issues confronting them. *See United States v. Chen*, 913 F.2d 183, 186 (5th Cir.1990) (citations omitted). However, in cases such as this one where the defendant did not object to the jury charge at trial, the district court's charge is subject to a plain error standard. *See United States v. Jones*, 673 F.2d 115, 118–19 (5th Cir.), *cert. denied*, 459 U.S. 863, 103 S.Ct. 140, 74 L.Ed.2d 119 (1982); *United States v. Richerson*, 833 F.2d 1147, 1155 (5th Cir. 1987). We therefore review the jury charge to determine if the error was so fundamental as to result in a miscarriage of justice. *Id.*

7. Ammunition for this pistol was found on Featherson.

8. The district court's jury charge is not included in the record nor is it in the briefs. The burden of presenting an adequate record on appeal is on the appellant. *See* Fed. R.App.P. 10(b)(2).

[22, 23] Featherson argues that the district court improperly instructed the jury that it could consider all three firearms found in his automobile—including the two firearms found in the trunk—to determine whether he used a firearm during a drug trafficking crime. Featherson argues that it was improper for the district court to instruct the jury regarding the two firearms in the trunk because they were not an integral part of the felony. We disagree. Featherson did not object to the instruction at trial so he would have to show error so fundamental as to result in a miscarriage of justice. *See Jones*, 673 F.2d at 118–19; *Richerson*, 833 F.2d at 1155. After reviewing the record, we cannot say that such an exceptional case is before us. Furthermore, because the contested jury instruction is not in the record, Featherson has waived his argument concerning the jury instruction. *See United States v. Baker*, 611 F.2d 964, 968 n. 4 (4th Cir.1979).

V.

CONCLUSION

Accordingly, we AFFIRM.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

No. 91-7611

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES EDWARD LANGSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for using or carrying a firearm during and in relation to a drug trafficking crime.

2. Whether the evidence was sufficient to support petitioner's conviction for conspiring to possess and distribute cocaine base.

3. Whether the court of appeals erred in declining to consider petitioner's claim that the district court improperly allowed the jury to use transcripts of tape-recorded conversations.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1485-1494) is reported at 949 F.2d 770.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1991. The petition for a writ of certiorari was filed on March 12, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiring to possess and distribute cocaine base, in violation

of 21 U.S.C. 846 (Count 1); distributing cocaine base, in violation of 21 U.S.C. 841(a)(1) (Counts 2, 3, 4, and 17); maintaining a residence to manufacture a controlled substance, in violation of 21 U.S.C. 856 (Counts 10 and 21); manufacturing and attempting to manufacture cocaine base, in violation of 21 U.S.C. 841(a)(1) (Counts 11 and 12); possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 13); and using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Count 14). He was sentenced to a total of 196 months' imprisonment. The court of appeals affirmed.

1. The evidence at trial showed that in 1989 and 1990 petitioner, along with his brother Ray Langston and a third man, Rodney Featherson, conducted a crack cocaine distribution operation out of a group of apartments located at 1702 Avenue B in Lubbock, Texas. Petitioner made numerous sales of crack cocaine to government informants; when he was unable to supply the requested amount, he referred the informant to one of the other men to complete the sale. Pet. App. 1488, 1491; Gov't C.A. Br. 6-15, 22-24.

On January 15, 1990, police officers searched Apartment Three at 1702 Avenue B and found petitioner in the process of manufacturing crack cocaine.[1] Petitioner was standing at a table that was covered with large quantities of cocaine hydrochloride

[1] Apartment Three was under the control of petitioner's brother, who had been given a key by the resident of the apartment. Pet. App. 1492 n.6.

and cocaine base, as well as plastic bags, baking soda, and razor blades. Under the mattress of a bed located six to eight feet from where petitioner was standing, the officers found a loaded .380 caliber semiautomatic pistol. During the search, petitioner sat on the bed with a woman who had also been in the apartment when the police arrived; he told her, "Don't say it's mine; don't say it's yours; don't say nothing." Pet. App. 1488, 1492-1493; Gov't C.A. Br. 10-12, 26-27.

At petitioner's trial, the government introduced tape recordings of conversations that took place in the course of the undercover drug transactions. Over petitioner's objection, the district court permitted the jury to use transcripts of the recordings that had been prepared by the government. Pet. App. 1489; Gov't C.A. Br. 17-18.

2. In the court of appeals, petitioner argued that the evidence was insufficient to sustain his conviction under 18 U.S.C. 924(c) for using or carrying a firearm during and in relation to a drug trafficking crime. The court of appeals held that the government may prove a violation of Section 924(c) "by showing that the weapon involved could have been used to protect or have the potential of facilitating [a drug trafficking] operation, and that the presence of the weapon was connected with the drug trafficking." Pet. App. 1492. In this case, the court found, there was "sufficient evidence for a jury to find that [petitioner] was in the apartment, knew that the gun was under the mattress, and that he could have used the gun to safeguard

the narcotics." Ibid. The court concluded that "a reasonable trier of fact could find a connection between the drug conspiracy and the firearm." Pet. App. 1493.

The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence to support his conspiracy conviction. The court found that the evidence showed that petitioner and his two co-conspirators "completed multiple drug transactions" at the apartments, and that they "communicated with one another and knowingly agreed to engage in the distribution of cocaine base." Pet. App. 1491.

Petitioner also argued that the district court erred in allowing the jury to use transcripts of the tape recordings of the undercover drug transactions, claiming that he did not have an adequate opportunity to review the transcripts prepared by the government and that the transcripts were inaccurate. The court of appeals stated that it was "unable to review the merits" of petitioner's contention because petitioner had failed to include the tape recordings and transcripts in the record on appeal. Pet. App. 1489-1490. In any event, the court concluded, petitioner had waived his right to challenge the jury's use of the transcripts by failing to "move for a recess or continuance after the transcripts were admitted in the district court." Pet. App. 1490.

ARGUMENT

1. Petitioner renews his contention (Pet. 4-7) that the evidence was insufficient to prove that he used or carried a

firearm during and in relation to a drug trafficking crime. The court of appeals properly rejected petitioner's fact-bound claim, and its decision is consistent with the decisions of other courts in similar circumstances.

The courts of appeals are in agreement that liability under Section 924(c)(1) "does not depend on proof that the defendant had actual possession of the weapon or used it in any affirmative manner," but only that "the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." United States v. Raborn, 872 F.2d 589, 595 (5th Cir. 1989). See, e.g., United States v. Medina, 944 F.2d 60, 66-67 (2d Cir. 1991), cert. denied, 112 S. Ct. 1508 (1992); United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.). Under that standard, there was ample evidence to support petitioner's conviction. The loaded pistol was readily accessible to petitioner in the apartment where he was manufacturing crack cocaine. The presence of large quantities of drugs and paraphernalia used in the manufacture of crack confirmed that the apartment was the location of a significant drug processing operation. Just a few steps from where petitioner was standing, the police found the loaded pistol, strategically located so as to be quickly and easily available for use.[2] Viewing the evidence in the light most favorable to the government, the jury certainly could have concluded that petitioner "used" the pistol

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[2] Petitioner's statement to the woman who was also present in the apartment confirmed that he knew that the gun was under the mattress.

to facilitate his drug trafficking crime. See United States v. Meggett, 875 F.2d 24, 29 (2d Cir.) (jury could reasonably conclude that loaded firearms found in defendant's apartment "were on hand to protect that apartment as a storage and processing point for large quantities of narcotics and that therefore the presence of weapons furthered or facilitated the narcotics operation"), cert. denied, 493 U.S. 858 (1989).

The decision below does not conflict with United States v. Feliz-Cordero, 859 F.2d 250 (2d Cir. 1988), or United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989), as petitioner claims. In Feliz-Cordero, the police found a firearm in a bedroom dresser drawer in an apartment in which drug records, about $11,000 in cash, a beeper, and a small amount of cocaine were also found. However, there was no evidence that any of the defendants processed or distributed drugs in that apartment; instead, they distributed cocaine from another apartment in the same building. 859 F.2d at 251-252. The court reversed the defendants' convictions under Section 924(c)(1) upon finding that "there is no basis to conclude that the gun [in the bedroom dresser drawer] would have been quickly accessible if needed." Id. at 254. In subsequent decisions, the Second Circuit has confirmed that its reversal of the convictions in Feliz-Cordero was based on "the absence of proof that the defendants * * * had placed the weapon to have it available for ready use during the transaction." United States v. Meggett, 875 F.2d at 29; see also United States v. Torres, 901 F.2d 205, 217-218 (2d Cir.) (evi-

dence that gun was found under mattress in apartment used for drug trafficking was sufficient to sustain conviction under Section 924(c)(1)), cert. denied, 111 S. Ct. 273 (1990); United States v. Alvarado, 882 F.2d 645, 653-654 (2d Cir. 1989) (upholding conviction based on evidence that guns were found in desk drawer and locked safe in apartment used for processing and selling cocaine), cert. denied, 493 U.S. 1071 (1990).[3] In contrast to Feliz-Cordero, in which the gun was not even in the apartment that was used for drug trafficking, here the loaded pistol was found six to eight feet away from where petitioner was manufacturing crack cocaine.

For similar reasons, United States v. Theodoropoulos, supra, is also unhelpful to petitioner. The conviction in that case depended on a finding that three firearms found in a trash can on the porch outside the defendant's apartment were used in connection with the narcotics conspiracy. 866 F.2d at 597. The court of appeals reversed, explaining that "the difficulty" in the case was that "three of the * * * guns on which the government relie[d] were found inside a trash can on the porch rather than in the apartment, and were not even discovered by the FBI until after [the defendants] were in FBI custody." Ibid. Here, the pistol was not found in a remote location outside the apartment; rather, it was maintained within easy reach under a mattress.

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[3] As was recently noted in United States v. Hadfield, 918 F.2d 987, 997 (1st Cir. 1990), cert. denied, 111 S. Ct. 2062 (1991), Feliz-Cordero has been "limit[ed] * * * to its own facts" by the subsequent Second Circuit decisions.

2. Petitioner also challenges (Pet. 7-8) the sufficiency of the evidence to sustain his conviction for conspiring to possess and distribute cocaine base. That fact-bound claim does not warrant review by this Court.

Citing United States v. Tyler, 758 F.2d 66 (2d Cir. 1985), petitioner claims (Pet. 7) that a defendant's "helping a willing buyer locate a willing seller, standing alone" is not enough to establish his membership in a conspiracy. Petitioner's reliance on Tyler is plainly misplaced. That case involved a single drug transaction, in which the defendant referred an undercover officer who was "looking for some good dope" to a heroin dealer; the defendant later asked the officer for money and received 75 cents. The court of appeals held that that evidence was insufficient to support the defendant's drug conspiracy conviction. Id. at 67-70. Here, in contrast, the evidence showed that petitioner, his brother, and Rodney Featherson made numerous sales of crack cocaine from the same group of apartments, that on several occasions petitioner referred prospective purchasers to his brother, who in turn made referrals to Featherson, and that petitioner manufactured crack cocaine in an apartment that was in his brother's custody. The court of appeals correctly held (Pet. App. 1490-1491) that this evidence of "concert of action" was sufficient to sustain petitioner's conspiracy conviction.

3. Finally, petitioner contends (Pet. 8-11) that the court of appeals erred in declining to review his challenge to the jury's use of transcripts of the tape recordings of the under-

cover drug transactions. The court of appeals properly refused to consider that claim.

First, the court was unable to consider the merits of petitioner's contention because petitioner had failed to include the tape recordings and transcripts in the record on appeal. It is the "responsibility of the appellant to insure that all materials on which he seeks to rely are part of the record on appeal," and "[w]hen an appellant asserts that his conviction should be reversed because of a particular error and the record does not permit the reviewing court to evaluate the claim, the court will generally refuse to consider it." United States v. Hart, 729 F.2d 662, 671 (10th Cir. 1984), cert. denied, 469 U.S. 1161 (1985); see also United States v. Wilson, 904 F.2d 656, 659 (11th Cir. 1990), cert. denied, 112 S. Ct. 250 (1991); Andrews v. United States, 817 F.2d 1277, 1281 (7th Cir.), cert. denied, 484 U.S. 857 (1987); United States v. Gerald, 624 F.2d 1291, 1296 n.1 (5th Cir. 1980), cert. denied, 450 U.S. 920 (1981); Fed. R. App. P. 10(b)(2). Petitioner now claims (Pet. 10) that he could not provide the court of appeals with the transcripts because they were in the control of the government. But petitioner, who was represented by counsel throughout his trial and appeal, does not suggest that he made any effort to obtain the transcripts or to request that the government supplement the record with the transcripts. Under these circumstances, the court of appeals did not err in declining to consider petitioner's challenge to the jury's use of the transcripts.

The court of appeals also correctly held that petitioner waived his claim that he did not have an adequate opportunity to review the transcripts by failing to move for a continuance after the transcripts were furnished by the government. A defendant who claims to have been the victim of a "sneak attack" by the government must "ask explicitly that the court grant the time needed to regroup, or waive the point." United States v. Diaz-Villafane, 874 F.2d 43, 47 (1st Cir.), cert. denied, 493 U.S. 862 (1989).

Petitioner's claim that the decision in this case conflicts with United States v. Osorio, 929 F.2d 753 (1st Cir. 1991), is mistaken. The Osorio court did not hold, as petitioner suggests, that a defendant's claim of prejudice resulting from the government's delayed disclosure of evidence is preserved merely by objecting at trial. To the contrary, the First Circuit made clear in that case that a defendant's "'claim that he was unfairly surprised is severely undermined, if not entirely undone, by his neglect to ask the trial court for a continuance to meet the claimed exigency.'" Id. at 758 (quoting United States v. Diaz-Villafane, 874 F.2d at 47).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1992

SUPREME COURT OF THE UNITED STATES

JAMES EDWARD LANGSTON

91–7611 *v.*

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHNNY LEE MUKES

91–7814 *v.*

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 91–7611 AND 91–7814. Decided October 13, 1992

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE THOMAS joins, dissenting.

In both of these cases, the petitioners contend that there was insufficient evidence to establish that they used a firearm during and in relation to a drug trafficking crime in violation of 18 U. S. C. § 924(c)(1).[1] In the course of searching Johnny Lee Mukes' house, officers found, in the top drawer of a nightstand in the bedroom, two plastic bags containing 32.9 grams of cocaine, a loaded .38 caliber derringer and an unloaded .25 caliber automatic pistol. *United States* v. *Mukes*, 952 F. 2d 404

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[1] 18 U. S. C. § 924(c)(1) provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime, be sentenced to imprisonment for five years. . . .

These cases involve only the "use" prong of the statute.

(CA6 1992) (unpub.). When the police found James Edward Langston, he was standing at a table covered with cocaine base, six to eight feet from which was a loaded .38 caliber semiautomatic pistol hidden under a mattress. *United States* v. *Featherson*, 949 F. 2d 770 (CA5 1991).

The Courts of Appeals for the Fifth and Sixth Circuits, construing the term "uses" broadly, held that the jury could reasonably conclude that the presence of the firearms was connected to the trafficking in that they could protect the petitioners' merchandise. See also *United States* v. *Blake*, 941 F. 2d 334, 342–343 (CA5 1991); *United States* v. *Molinar-Apodaca*, 889 F. 2d 1417, 1424 (CA5 1989). Other courts have adopted the same approach. See, *e.g.*, *United States* v. *Wilkinson*, 926 F. 2d 22, 25–26 (CA1), cert. denied, 111 S. Ct. 2813 (1991); *United States* v. *Paz*, 927 F. 2d 176, 179 (CA4 1991); *United States* v. *Young-Bey*, 893 F. 2d 178, 181 (CA8 1990); *United States* v. *Martinez*, 967 F. 2d 1343, 1346–47 (CA9 1992); *United States* v. *Handa*, 943 F. 2d 55 (CA9 1991) (unpub.); *United States* v. *Poole*, 878 F. 2d 1389, 1393–94 (CA11 1989).

The petitioners insist that § 924(c) does not contemplate presuming an intent to use a firearm in relation to drug trafficking from the fact that a gun was found in the same room as drugs and related paraphernalia. The Sixth Circuit remarked that Mukes' position "has some support in case law from other circuits," and, in particular, cited the Second Circuit's decision in *United States* v. *Felix-Cordero*, 859 F. 2d 250, 254 (CA2 1988). See *Mukes*, *supra* ("[*Felix-Cordero*] is difficult to reconcile with our circuit precedent. . . . Insofar as there is a conflict, of course, and unless the Supreme Court or Congress should instruct us otherwise, we must follow our own precedents.").[2] Petitioners also rely on cases from the Third

[2] In *United States* v. *Jackson*, 924 F. 2d 1059 (CA6) (unpub.), cert. denied, 112 S. Ct. 97 (1991), the Sixth Circuit noted that some courts had held that "the 'in relation to' language of section 924(c) requires more than 'mere availability': the circumstances must suggest that the defendant intend to and be able to use the firearms during the offense. This, however, has not been the law of the Sixth Circuit."

and D. C. Circuits. See *United States* v. *Bruce*, 939 F. 2d 1053, 1054–1056 (CADC 1991); *United States* v. *Theodoropoulos*, 866 F. 2d 587, 597–598 (CA3 1989). But see *United States* v. *Jefferson*, 1992 U. S. App. LEXIS 21614 (CADC 1992).

Because this issue arises with some frequency, and in light of the conflict in the Circuits, which shows no signs of abating, I would grant certiorari to clarify the meaning and scope of section 924(c).